Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

JEFFREY BISEL and DENNIS ROEHM,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Submitted by:
David E. Jarvis
Counsel of Record
Thomas Armstrong
QUARLES & BRADY
411 East Wisconsin Avenue
Milwaukee, WI 53202-4497
(414) 277-5000

John C. Cabaniss
LAW OFFICE OF JOHN C. CABANISS
Suite 725
250 East Wisconsin Avenue
Milwaukee WI 53202
(414) 278-6066

Counsel for Petitioners

QUESTIONS PRESENTED FOR REVIEW

The questions presented by the petition are:

1. IS THE GOVERNMENT'S POTENTIAL LIABILITY UNDER THE FEDERAL TORT CLAIMS ACT, 28 U.S.C. §§ 1346(b)(1), 2671-80, TO BE DETERMINED AT THE TIME A GOVERNMENT EMPLOYEE COMMITS AN ACT OF NEGLIGENCE OR AT THE TIME A RESULTING ACCIDENT OR INJURY OCCURS?

2. DOES THE "FERES DOCTRINE" BAR AN ACTION AGAINST THE GOVERNMENT WHERE INJURED SERVICE MEMBERS INTEND TO RELY SOLELY ON THE GOVERNMENT'S OWN DOCUMENTED INTERNAL INVESTIGATION AND FINDINGS TO ESTABLISH THE GOVERNMENT'S LIABILITY?

3. SHOULD THE COURT EITHER OVERRULE THE "FERES DOCTRINE" OR, ALTERNATIVELY, LIMIT ITS SCOPE TO CASES INVOLVING SERVICE-RELATED INJURIES CAUSED BY MILITARY NEGLIGENCE WHICH OCCURS IN PURSUIT OF SOME PALPABLE MILITARY OBJECTIVE?

TABLE OF CONTENTS

Page No.

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF THE BASIS FOR JURISDICTION ... 2

FEDERAL STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

A. Basis For Jurisdiction 3

B. Underlying Facts And Proceedings Below 4

1. Factual Background 4

2. Proceedings Below 7

INTRODUCTION 17

ARGUMENT 19

I. 28 U.S.C. § 1346(b)(1) REQUIRES A DISTRICT COURT TO APPLY THE RESPONDEAT SUPERIOR-LAW OF THE STATE WHERE A NEGLIGENT ACT OR OMISSION OCCURRED NOT WHERE THE NEGLIGENT ACT OR OMISSION HAD ITS OPERATIVE EFFECT; BY PARITY OF REASONING,AS WELL AS THE EXPRESS LANGUAGE USED IN § 1346(b)(1), WHETHER A GOVERNMENT EMPLOYEE WAS ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT UNDER A GIVEN STATE'S RESPONDEAT SUPERIOR LAW MUST BE DETERMINED FROM AN EXAMINATION OF THE CIRCUMSTANCES EXISTING AT THE TIME OF THE NEGLIGENT ACT OR OMISSION, NOT THE CIRCUMSTANCES EXISTING AT THE TIME OF THE ACCIDENT 19

Page No.

II. COUNT II OF PETITIONERS' COMPLAINT SHOULD NOT HAVE BEEN DISMISSED UNDER THE FERES/SHEARER DOCTRINE BECAUSE ADJUDICATION OF THAT CLAIM COULD HAVE TAKEN PLACE BY PETITIONERS' RELYING SOLELY UPON THE NAVY'S OWN INVESTIGATIVE REPORTS AND FINDINGS TO ESTABLISH THE NEGLIGENCE OF HELBIG'S SUPERIORS AND THE SHORE PATROL, THUS PRECLUDING THE DISTRICT COURT FROM HAVING TO INQUIRE INTO MILITARY DECISIONS INVOLVING THE COMMAND, CONTROL, MANAGEMENT, AND DISCIPLINE OF ITS SERVICE MEMBERS 24

III. THE COURT SHOULD EITHER OVERRULE THE "FERES/SHEARER DOCTRINE" OR, ALTERNATIVELY, LIMIT ITS SCOPE TO CASES INVOLVING SERVICE-RELATED INJURIES CAUSED BY MILITARY NEGLIGENCE WHICH OCCURS IN PURSUIT OF SOME PALPABLE MILITARY OBJECTIVE CONCLUSION 25

CONCLUSION 27

TABLE OF AUTHORITIES

Page No.

Aetna Cas. & Sur. Co. v. W.C.A.B.,
187 Cal. App. 3d 992, 232 Cal. Rptr.
257 (1986) 11

Anderson v. Pacific Gas & Elec. Co.,
14 Cal. App. 4th 245, 17 Cal. Rptr. 2d
534 (Ct. App. 1993) 9

Baroid v. Worker's Compensation Appeals Board,
121 Cal. App. 3d 558, 175 Cal. Rptr.
633 (1981) 10

Boynton v. McKales, 139 Cal. App. 2d 777,
294 P.2d 733 (1956) 9

Brock v. United States, 601 F.2d 976
(9th Cir. 1979) 19

Carr v. Wm. C. Crowell, 28 Cal. 2d 652,
171 P.2d 5 (1946) 24

Chastain v. Litton Systems, Inc., 694 F.2d
957 (4th Cir. 1983) 11

Childers v. Shasta Livestock Auction Yard, Inc.,
190 Cal. App. 3d 792, 235 Cal. Rptr.
641 (Ct. App. 1987)
..... 10,11,
12,22,24

Dickenson v. Edwards, 105 Wash. 2d 457, 716
P.2d 814 (1986) 11

Doggett v. United States, 875 F.2d 684
(9th Cir. 1989) 18,25

Estate of McAllister v. United States,
942 F.2d 1473 (9th Cir. 1991) 18

Page No.

Farmer's Ins. Group v. County of Santa Clara, 47 Cal. Rptr. 2d 478, 906 P.2d 440 (1995) 9,24

Felix v. Asai, 192 Cal. App. 3d 926, 237 Cal. Rptr. 718 (Ct. App. 1987) 9,10

Feres v. United States, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950) 3,8,15

Flechsig v. United States, 991 F.2d 300, (6th Cir. 1993) 7

Harris v. Trojan Fireworks Co., 120 Cal. App. 3d 157, 174 Cal. Rptr. 452 (1981) 11

Henriksen v. City of Rialto, 20 Cal. App. 4th 1612, 25 Cal. Rptr. 2d 308 (1993) 11,24

Hinman v. Westinghouse Elec. Co., 88 Cal. Rptr. 199, 471 P.2d 988 (1970) 9

Hunt v. United States, 636 F.2d 580 (D.C. Cir. 1980) 18

LeElder v. Rice, 21 Cal. App. 4th 1604, 26 Cal. Rptr. 2d 749 (Ct. App. 1994) 10

Lisa M. v. Henry Mayo Newhall Mem'l Hosp., 48 Cal. Rptr. 2d 510, 907 P.2d 358 (1995) 9,24

Major v. United States, 835 F.2d 641 (6th Cir. 1987) 8,15,25

Mary M. v. City of Los Angeles, 285 Cal. Rptr. 99, 814 P.2d 1341 (1991) 24

McCarty v. Workmen's Compensation Appeals Board, 117 Cal. Rptr. 65, 527 P.2d 617 (1974) 11,24

Page No.

Richards v. United States, 369 U.S. 1, 82 S. Ct. 585, 7 L. Ed. 2d 492 (1962) 19,20

Roberts v. United States, 498 F.2d 520, (9th Cir. 1974), cert. denied, 419 U.S. 1070, 95 S. Ct. 656, 42 L. Ed. 2d 665 19

Rodgers v. Kemper Constr. Co., 50 Cal. App. 3d 608, 124 Cal. Rptr. 143 (Ct. App. 1975) 22,23,24

Sagadin v. Ripper, 175 Cal. App. 3d 1141, 221 Cal. Rptr. 675 (1985) 14

Sheridan v. United States, 487 U.S. 392, 108 S. Ct. 2449, 101 L. Ed. 2d 352 (1988) 18,20,21

Taber v. Maine, 67 F.3d 1029 (2nd Cir. 1995) 11,18, 22,23,26

United States v. Johnson, 481 U.S. 681, 107 S. Ct. 2063, 95 L. Ed. 2d 648 (1987)..... 4,18,26

United States v. Shearer, 473 U.S. 52, 105 S. Ct. 3039, 87 L. Ed. 2d 38 (1985)..... 3,8 ,25

United States v. Taylor, 236 F.2d 649 (6th Cir. 1956)..... 7

West American Ins. Co. v. California Mutual Ins. Co., 195 Cal. App. 3d 314, 240 Cal. Rptr. 540 (1987) 11

White v. County of Orange, 166 Cal. App. 3d 566, 212 Cal. Rptr. 493 (Ct. App. 1985)..... 24

Page No.

Williams v. United States, 350 U.S. 857, 76 S. Ct. 100, 100 L. Ed. 761 (1955) 7

Wong-Leong v. Hawaiian Independent Refinery Inc., 76 Haw. 433, 879 P.2d 538 (1994) 12

FEDERAL STATUTES:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

28 U.S.C. § 1346(b)(1) ..... *passim*

28 U.S.C. § 2671 2,3,7

28 U.S.C. § 2674 3

28 U.S.C. § 2680 3

SUPREME COURT RULES:

Rule 10(a) and (c) 3

ADDITIONAL AUTHORITIES:

Jayson, Handling Federal Tort Claims § 5A.02

Comment, Employer Liability For A Drunken Employee's Actions Following An Office Party: A Cause Of Action Under Respondeat Superior, 19 Cal. W. L. Rev. 107 (1982) 5

Note, From Feres To Stencel: Should Military Personnel Have Access To FTCA Recovery? 77 Mich. L. Rev. 1099 (1979) 18

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PETITION FOR WRIT OF CERTIORARI

Petitioners Jeffrey Bisel and Dennis Roehm respectfully move this Honorable Court to issue a writ of certiorari to review the unpublished opinion of the United States Court of Appeals for the Sixth Circuit entered on July 22, 1997, with rehearing denied on August 13, 1997.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Sixth Circuit affirming the district court's granting of summary judgment in favor of the Government appears in Petitioners' Appendix at A1 through A8, and the court's order denying rehearing appears in the Appendix at C1. The decisions of the United States District Court for the Western District of Michigan denying the Government's motion to dismiss in part, and granting it in part, as well as the court's granting of the Government's motion for summary judgment appear in the Appendix at D1 through D6 and F1 through F11, respectively.

STATEMENT OF THE BASIS FOR JURISDICTION

1. The opinion of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was rendered on July 22, 1997.

2. Petitioners' timely motion for rehearing was denied on August 13, 1997.

3. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1254(1) and Rule 10(a) and (c).

4. Jurisdiction of the United States Court of Appeals for the Sixth Circuit was predicated on 28 U.S.C. § 1291.

5. Jurisdiction of the United States District Court for the Western District of Michigan was predicated on 28 U.S.C. §§ 1346(b)(1), 2671-80.

FEDERAL STATUTES INVOLVED

1. 28 U.S.C. § 1346(b)(1) provides in pertinent part:

> Subject to the provisions of (28 U.S.C. §§ 2671-2680), the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. 28 U.S.C. § 2671 provides in pertinent part:

> As used in this chapter and §§ 1346(b) . . . of this title, . . . 'Employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States . . . 'Acting within the scope of his office or employment,' in the case of a member of the military or naval forces of the United States . . . means acting in the line of duty.

3. 28 U.S.C. § 2674 provides in pertinent part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

4. 28 U.S.C. § 2680(j) provides:

> The provisions of this chapter and § 1346(b) of this title shall not apply to any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

STATEMENT OF THE CASE

A. Basis For Jurisdiction

Petitioners invoke the jurisdiction of this Court pursuant to Rule 10(a) and (c), Rules of the Supreme Court of the United States, in that the court below, the United States Court of Appeals for the Sixth Circuit, has interpreted the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b)(1), 2671-80, in a manner inconsistent with decisions of this Court and decisions of other federal Courts of Appeal.

Additionally, Petitioners ask this Court to hold that Feres v. United States, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950), and United States v. Shearer, 473 U.S. 52, 105 S. Ct. 3039, 87

L. Ed. 2d 38 (1985), do not bar actions by service members where they intend to rely solely on the Government's own investigative reports and findings to establish the Government's liability.

Alternatively, Petitioners ask this Court to adopt the position advanced by the dissent in United States v. Johnson, 481 U.S. 681, 107 S. Ct. 2063, 95 L. Ed. 2d 648 (1987), and either overrule Feres and its progeny, or limit their scope to those cases in which military negligence is related to pursuit of some palpable military objective.

B. Underlying Facts And Proceedings Below

1. Factual Background[1]

In March, 1991, 19-year old Petitioner Jeffrey Bisel ("Bisel"), 20-year old Petitioner Dennis Roehm ("Roehm"), and 19-year old William Helbig ("Helbig") were in the United States Navy, assigned to the Engineering Department of the USS Racine ("Racine"). Bisel and Roehm resided on the Racine; Helbig resided in military family quarters a short distance from the Naval Station Long Beach ("NSLB"), the Racine's home port. (R. 44, Statement of Material Facts ["SMF"], ¶¶ 1, 3, 6, 8, 9; R. 48, Exh. A, Findings 14, 16, 18.)

On March 6, 1991, the Racine returned to NSLB after being at sea for approximately one month. The members of the Engineering Department were informed that a party for Department members and their guests had been approved by the ship's Executive Officer; the party was scheduled to take place on Friday, March 8 from 11:30 a.m. until approximately 4:00 p.m. at Mole Park, a recreation area located on NSLB, approximately 1-1/2 miles from the Racine. Eleven to twelve cases of beer were purchased for the party by Navy personnel using monies from the Racine's Morale, Welfare and Recreation Fund. (R. 44, SMF ¶¶ 11, 13, 21; R. 48, Exh. A, Findings 1, 2, 9.)

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[1] In the proceedings below, Petitioners and the Government entered into a stipulated statement of material facts from which the factual background was taken.

Members of the Engineering Department who were in a "liberty" status[2] for the afternoon of March 8 were informed that they were expected to attend the party. Bisel, Roehm, and Helbig were on duty the morning of March 8 but assumed "liberty" status at noon; their liberty was to continue until 7:00 a.m. the next morning. (R. 44, SMF ¶¶ 17, 18, 29, 55, 56; SMF Exh. 1, pp. 11, 86, 87.)

Sometime between 12:00 noon and 12:30 p.m., Helbig left the Racine and drove his wife's car, which he had driven to the Racine that morning, to the party. Helbig understood that one of the purposes of the party was to permit underage sailors to "get drunk." Upon his arrival at the party, Helbig was given a beer by one of his superiors, and Helbig continued to drink beer until he left the party at approximately 2:30 p.m. (R. 44, SMF ¶¶ 15, 16, 17, 19, 20, 23, 24, 32, 33; SMF Exh. 1, p. 12.)

Helbig and other underage service members were observed drinking by a number of superior officers, as well as personnel designated as Shore Patrol. Little was done to discourage these individuals from drinking — virtually all Engineering Department personnel, whether or not of legal drinking age, were freely consuming alcohol. Helbig felt that he was "encouraged" to drink because his attendance at the party was expected, because eleven to twelve cases of beer were accessible to anyone without restriction, and because everyone was drinking in plain view of superior officers and the Shore Patrol. (R. 44, SMF ¶¶ 25-27; SMF Exh. 1, pp. 11, 14, 87; R. 48, Exh. A, Findings 11, 12, 13, 20 and Opin. 6-9.)

Despite knowing that he would be driving his wife's car after leaving the party, Helbig nevertheless consumed anywhere from six to twelve beers in the two hours he was there. At approximately 2:30 p.m., Helbig left the party, intending to drive to his off-base military quarters to pick up his wife and return. In the parking lot adjacent to Mole Park, Helbig was approached by Bisel

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[2]Service personnel in a "liberty" status are off-duty, free to engage in personal pursuits, and not subject to direct military control. See, e.g., Jayson, Handling Federal Tort Claims § 5A.02, pp. 25-26.

and Roehm who asked to accompany him. (R. 44, SMF ¶¶ 30, 32-25; R. 48, p. 1 n.1 and Exh. A, Finding 19.)

Once in Helbig's car, the three decided to go to his off-base quarters to continue drinking rather than return to the party. With this change in plan, Helbig drove to a liquor store in his old neighborhood, approximately eight miles away, to purchase beer. Prior to leaving the parking lot, Roehm passed around a pint bottle of liquor which the three finished. Nothing was done by anyone at the party to discourage Helbig from leaving the party or the base in his car. (R. 44, SMF ¶¶ 35-38; SMF Exh. 1, p. 16; R. 48, Exh. A, Finding 13.)

Although Helbig had little or no recollection of the events following his departure from the base, he apparently drove to a liquor store in Long Beach and purchased a 12-pack of beer. The driving time to the liquor store was approximately 15 to 20 minutes. (R. 44, SMF ¶¶ 41-44; SMF Exh. 1, pp. 21, 97.)

At approximately 4:00 p.m. on his way to his off-base residence, Helbig drove his wife's car into the back of a tractor trailer on the Gerald Desmond Bridge in Long Beach. Five empty cans of beer were found on the floor of the car.[3] Helbig was intoxicated at the time of the accident.[4] Although Helbig received only minor injuries, both Bisel and Roehm sustained serious and permanent head injuries. (R. 44, SMF ¶¶ 45, 46, 52, 57.)[5]

In its subsequent accident investigation, the Navy found that nothing had been done to discourage underage drinking at the party, and that little had been done to prevent intoxicated personnel from leaving the base in their vehicles. The investigation concluded that the Commanding Officer had failed to ensure that state and

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[3]The remainder of the case was found unopened.

[4]Approximately two hours after the accident Helbig was given a blood alcohol test which showed his blood alcohol content to be .208 mg/dl. (R. 44, SMF ¶ 54.)

[5]In 1992, the Navy found both Bisel, a paraplegic, and Roehm, a quadriplegic, to be 100% disabled as a result of their injuries; both were given honorable discharges in 1993. (R. 44, SMF ¶¶ 67, 68.)

local alcohol laws were enforced, that the Executive Officer had failed to ensure that proper and adequately trained personnel were assigned to Shore Patrol, that the Chief Engineer had failed to properly supervise the planning and execution of the party, and that other officers had failed to provide proper supervision at the party. (R. 48, Exh. A, Opin. 6-9.)

The Navy also determined that the primary cause of the accident was Helbig's driving in an intoxicated condition, that neither Bisel nor Roehm had any role in causing the accident, but that a secondary cause was the Navy's chain of command providing alcohol to Helbig and allowing Helbig to drive off base in an intoxicated condition. (R. 48, Exh. A, Finding 53, Opin. 2-5.)

2. Proceedings Below

On February 22, 1994, Bisel and Roehm commenced an FTCA action against the Government in the United States District Court for the Western District of Michigan. The action consisted of two separate claims: First, in Count I, Bisel and Roehm alleged that Helbig negligently consumed alcohol within the scope of his employment at the on-base party, and that this negligent consumption of alcohol caused Helbig to negligently operate his vehicle in such a way as to cause the accident. The Government's vicarious liability for Helbig's separate acts of negligence, i.e., his negligent consumption of alcohol and negligent driving, was predicated on the doctrine of respondeat superior as interpreted and applied in California.[6]

Next, in Count II, Bisel and Roehm alleged that Helbig's superiors, as well as the Shore Patrol, negligently failed to properly supervise Helbig and allowed him to leave the party in an obvi-

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[6]The FTCA allows civil actions against the Government based on the negligent acts or omissions of its employees, see 28 U.S.C. § 1346(b)(1), including those of members of the Armed Services who are acting "in the line of duty." 28 U.S.C. § 2671. The courts have uniformly equated the FTCA's "line of duty" language with the phrase "scope of employment," as that concept is defined by the respondeat superior law of the jurisdiction in which the negligent act or omission occurred. See, e.g., Williams v. United States, 350 U.S. 857, 76 S. Ct. 100, 100 L. Ed. 761 (1955); Flechsig v. United States, 991 F.2d 300, 302 (6th Cir. 1993); United States v. Taylor, 236 F.2d 649, 653 (6th Cir. 1956).

ously intoxicated condition which was a proximate cause of the ensuing accident.

The Government moved to dismiss both claims alleging that the district court lacked subject matter jurisdiction under the "Feres doctrine," which provides that the Government is immune from suit by service personnel where an injury is incurred "incident to military service." See Feres v. United States, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950). Additionally, the Government claimed that subject matter jurisdiction was lacking with respect to both counts under United States v. Shearer, 473 U.S. 52, 105 S. Ct. 3039, 87 L. Ed. 2d 38 (1985), which held that an action by a member of the armed services is barred where adjudication of the claim would require impermissible judicial inquiry into military decisions involving the command, control, management, and discipline of its service members.

In a decision dated September 27, 1994, the district court held that Feres/Shearer barred Count II of the Complaint because resolution of that claim would require the court to judge the actions of Helbig's superiors and the Shore Patrol in failing to prevent Helbig from leaving the party in his automobile.[7] (App. D3.)

The Court held, however, that Count I of the Complaint was not barred because at the time of the accident, Bisel and Roehm were engaged in a distinctly non-military act off base, were not subject to military control, and thus were not injured "incident to service" within the meaning of Feres. Moreover, the court held that adjudication of Count I would not run afoul of Shearer because only Helbig's negligence was alleged. (App. D3-D6.)

Accordingly, the district court granted the Government's motion to dismiss Count II and denied the motion with regard to Count I. For purposes of Count I, the court assumed that Helbig was acting within the scope of his employment "at the time of the accident" (App. D2); however, the court concluded its opinion with the following caveat:

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[7]In addition to Feres/Shearer, the court relied upon Major v. United States, 835 F.2d 641 (6th Cir. 1987).

> The court observes, however, that Plaintiffs face a difficult burden of establishing that Helbig was acting within the scope of his employment at the time of the accident. . . . Having alleged that Plaintiffs were not acting "incident to service" at the time of the accident Plaintiffs may find it difficult to show that Helbig's activity was within the "scope of employment" at the time of the accident.

(App. D5-D6.) (emphasis added)

Subsequently, on September 14, 1995, the Government moved for summary judgment on Count I claiming that under California law, Helbig was not acting within the scope of his employment at the time of the accident, thus precluding the Government's respondeat superior liability.

Under California's law of respondeat superior, an employer is vicariously liable for the torts of its employees committed while acting within the scope of their employment. See Lisa M. v. Henry Mayo Newhall Mem'l Hosp., 48 Cal. Rptr. 2d 510, 907 P.2d 358 (1995); Farmer's Ins. Group v. County of Santa Clara, 47 Cal. Rptr. 2d 478, 906 P.2d 440 (1995). Generally, an employee is not considered to be acting within the scope of his employment while driving to or from his place of work. See Anderson v. Pacific Gas & Elec. Co., 14 Cal. App. 4th 245, 17 Cal. Rptr. 2d 534, 536 (Ct. App. 1993); Felix v. Asai, 192 Cal. App. 3d 926, 237 Cal. Rptr. 718, 721 (Ct. App. 1987). However, there are several exceptions to this "going and coming" rule.

The first is the "special errand" exception; an employee is deemed to be acting within the scope of his employment when driving home from a special assignment or function which the employer requests the employee to perform or attend. See, e.g., Hinman v. Westinghouse Elec. Co., 88 Cal. Rptr. 199, 471 P.2d 988, 991 (1970). However, this exception to the "going and coming" rule is subject to its own exception: If the employee "substantially departs" from his route home to pursue personal matters, he is no longer deemed to be acting within the scope of his employment. See, e.g., Boynton v. McKales, 139 Cal. App. 2d 777, 294

P.2d 733, 740 (1956); Felix, supra; LeElder v. Rice, 21 Cal. App. 4th 1604, 26 Cal. Rptr. 2d 749, 751 (Ct. App. 1994).

The other relevant exception to the "going and coming" rule is the "special risk" doctrine, which provides that an employer is liable for any injury proximately caused by a special risk of harm created by an employment-related activity even though the employee is not acting within the scope of his employment when the harm occurs. This "special risk" exception to the "going and coming" rule is separate and distinct from the "special errand" exception. See, e.g., Baroid v. Worker's Compensation Appeals Board, 121 Cal. App. 3d 558, 175 Cal. Rptr. 633, 534 (1981); Childers v. Shasta Livestock Auction Yard, Inc., 190 Cal. App. 3d 792, 235 Cal. Rptr. 641, 652-654 (1987).

Under the "special risk" doctrine, as opposed to the "special errand" doctrine, the focus is on the creation of the risk rather than where and when that risk results in harm. If the risk is created within the scope of employment and proximately causes harm, the employer is vicariously liable regardless of where and when the harm occurs, i.e., even if the employee has "substantially departed" from his employment-related activities: "Respondeat superior liability is properly applied where an employee undertakes activities within his or her scope of employment that caused the employee to become an instrumentality of danger to others even where the danger may manifest itself at times and locations remote from the ordinary workplace." Childers, supra, 235 Cal. Rptr. at 647.

The "special risk" doctrine is most often applied in employee intoxication cases. Where an employer sanctions alcohol consumption by an employee during an employment-related activity, a special risk of harm to others is created if the employee becomes intoxicated and leaves for home in his automobile. California courts have uniformly held that the employer is liable for any injury proximately caused by the employee's intoxicated driving even if the employee would not otherwise be deemed to be within the scope of employment when he causes the harm. That is, the scope of employment is deemed to follow the risk to others as

long as the risk lasts, i.e., as long as the employee remains intoxicated. See, e.g., Childers, supra, at 647-650 ("So long as the risk is created within the scope of employment, the scope of the employee's employment must follow the risk so long as it acts proximately to cause injury . . . . Once the risk (the consumption of alcohol) is shown to have been created within the scope of employment, the doctrine of respondeat superior makes the employer liable for injuries proximately caused by the risk.");[8] McCarty v. Workmen's Compensation Appeals Board, 117 Cal. Rptr. 665, 527 P.2d 617, 619 (1974) ("If the proximate cause is of industrial origin, the time and place of injury or death even if foreign to the premises does not serve to nullify recovery."); Harris v. Trojan Fireworks Co., 120 Cal. App. 3d 157, 174 Cal. Rptr. 452, 456, 457 (1981); Aetna Cas. & Sur. Co. v. W.C.A.B., 187 Cal. App. 3d 992, 232 Cal. Rptr. 257, 261 (1986); West American Ins. Co. v. California Mutual Ins. Co., 195 Cal. App. 3d 314, 240 Cal. Rptr. 540, 543-544 (1987); Henriksen v. City of Rialto, 20 Cal. App. 4th 1612, 25 Cal. Rptr. 2d 308, 314 (1993); Comment, Employer Liability For A Drunken Employee's Actions Following An Office Party: A Cause Of Action Under Respondeat Superior, 19 Cal. W. L. Rev. 107 (1982).

Additionally, both state courts and federal courts of appeal applying or relying upon California law have held that an employer is liable under the doctrine of respondeat superior if an injury is proximately caused by an employee who negligently becomes intoxicated at an employer-sponsored function (i.e., within the scope of his employment) regardless of the "going and coming" rule, and regardless of whether the "substantial departure" doctrine would otherwise preclude application of the "special errand" rule. See, e.g., Taber v. Maine, 67 F.3d 1029, 1033-1037 (2nd Cir. 1995); Chastain v. Litton Systems, Inc., 694 F.2d 957, 962 (4th Cir. 1983); Dickenson v. Edwards, 105 Wash. 2d 457, 716 P.2d 814, 820-821

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[8]The Childers court used the following hypothetical to illustrate the "special risk" exception to the "going and coming" rule: "[S]uppose an employee manufacturing radioactive fuel becomes contaminated on the job and later contaminates non-employees while playing basketball in a gym far from the job site, causing them injury. In this example, plainly the risk of injury is created by the enterprise; we have no doubt the enterprise should fairly bear the cost of injury. Childers, 235 Cal. Rptr. at 647.

(1986); Wong-Leong v. Hawaiian Independent Refinery, Inc., 76 Haw. 433, 879 P.2d 538, 544-545 (1994).

The reason the "substantial departure" doctrine does not apply in employee intoxication cases results from the fact that under California law, the cause of an alcohol-related injury involving an automobile is not only the driver's negligence in operating the vehicle, but also his consumption of alcohol which affects his driving. See Childers, supra, 235 Cal. Rptr. at 648, 650:

> Abundant evidence showed Abbott's consumption of alcohol occurred within the scope of her employment, thereby creating a risk that was a proximate cause of plaintiff's injuries. Since the risk created by the enterprise was still acting as a proximate cause of injury at the time of the accident, Toni Abbott was within the scope of her employment when the accident occurred . . . Toni Abbott's wrongful act was undertaken in and as a part of the transaction of (Shasta's) business . . . [T]he employer is liable for the risk of an employee's consumption of alcohol within the employee's scope of employment . . . The consumption of alcoholic beverages (is) the proximate cause of injuries inflicted upon another by an intoxicated person. (emphasis added)

Thus, under California law, there are two actionable wrongs involved in an automobile accident where the use of alcohol is implicated; the first arises from the fact that the driver negligently consumed alcohol knowing he would be driving an automobile, and the second arises from the negligent operation of the vehicle.

In response to the Government's summary judgment motion, Petitioners asserted that both California exceptions to the "going and coming" rule applied because Helbig committed two independent acts of negligence. First, Helbig's negligent driving was within the scope of his employment because he was returning from a "special errand." Petitioners disputed the Government's claim that Helbig's trip to the liquor store constituted a "substantial departure"

sufficient to negate the "special errand" rule.

Second, Petitioners asserted that even if Helbig were not acting within the scope of his employment when he negligently drove into the back of the tractor trailer, Helbig's becoming intoxicated by consuming six to twelve beers in a two-hour period at the party constituted negligent conduct which occurred within the scope of his employment and proximately caused the accident. Accordingly, Petitioners asserted that under both the "special errand" and the "special risk" exceptions to the "going and coming" rule, the Government was vicariously liable for Helbig's acts of negligence.

The district court granted the Government's summary judgment motion on the ground that Helbig was not acting within the scope of his employment at the time of the accident:

> Whether or not this court has jurisdiction over Plaintiffs' claim that the government is vicariously liable for Helbig's negligence, then, depends on whether Helbig, at the time of the accident, was acting "within the scope of his employment" as that term is defined by California law . . . .
>
> Plaintiffs contend that . . . when an employer furnishes alcohol at an employer-sponsored party which employees are expected to attend, and an employee becomes intoxicated, the employee is within the scope of his employment if his intoxicated condition results in injury to himself or another, "regardless of when or where the injury is sustained." . . . Plaintiffs overstate the holdings (in the California cases).
>
> . . . Where the employee's conduct has substantially deviated from his or her duties, it is unjust to hold the employer liable. Thus, it is necessary to determine the main purpose of injury-producing activity: If it was the pursuit of the employee's personal ends, the employer is not liable. . . .

> If the accident had occurred while Helbig was driving home directly after leaving the Engineering party, it appears that under California case law there would at least be a question of fact as to whether or not the party was for the benefit of his employer such that the employer should be held liable under the doctrine of respondeat superior.
>
> Helbig, however, did not go directly home. . . . The accident did not occur until an hour and one-half after he left the party.
>
> Even if Helbig's consumption of alcohol at the Engineering party was within the scope of his employment, by the time of the accident he had departed substantially from his employment. He had embarked on a purely personal mission which included purchasing and drinking additional alcohol. These are not risks inherent and are created by the Navy's enterprise. The Navy could not reasonably have expected or foreseen this diversion. Helbig's actions after leaving the party were not foreseeable and it would not be fair to impose the loss resulting from Helbig's actions on the Navy.

(App. F4, F9-F10.) (emphasis added)[9]

In arriving at the above result, the district court refused to consider the crucial significance of Helbig's conduct prior to the accident. The court limited its determination of governmental liability under 28 U.S.C. § 1346(b)(1) to whether Helbig was acting within the scope of his employment, as defined by California's law of

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[9]The Court's language suggests that it was deciding the case on an issue of superseding cause which the Government never even argued. In any event, such a defense would be untenable. Under California law, Helbig's "substantial departure" from his course home to purchase additional liquor would hardly constitute a superseding cause of the accident. As the court observed in Sagadin v. Ripper, 175 Cal. App. 3d 1141, 221 Cal. Rptr. 675, 685-687 (1985), "Ordinary human experience would anticipate that a partying group of young drinkers will continue to drink elsewhere . . . ." Sagadin, 221 Cal. Rptr. at 687.

respondeat superior, when the accident occurred. Because the court concluded that Helbig had substantially departed from his route home when the accident occurred, and thus was not acting within the scope of his employment at that time, the court granted summary judgment to the Government.

Petitioners appealed the dismissal of both counts. While Petitioners conceded that the Sixth Circuit's interpretation of Shearer, contained in Major v. United States, 835 F.2d 641 (6th Cir. 1987), precluded the viability of their claim against Helbig's superiors and the Shore Patrol,[10] Petitioners insisted that Count I was improperly dismissed. Petitioners asked the Court to hold that Helbig's becoming intoxicated on beer supplied by the Navy was within the scope of his employment, and thus the Government was liable for any injuries proximately caused by Helbig's intoxicated driving.[11]

The Court of Appeals upheld the district court's dismissal of Count I; the Court held that under the FTCA, the issue is simply

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[10]In Major the court held that: "Review of . . . Supreme Court precedent makes it clear that in recent years the Court has embarked on a course dedicated to broadening the Feres doctrine to encompass, at a minimum, all injuries suffered by military personnel that are even remotely related to the individual's status as a member of the military, without regard to the location of the event, the status (military or civilian) of the tortfeasor, or any nexus between the injury-producing event and the essential defense/combat purpose of the military activity from which it arose. Although the doctrine itself as well as its recent expansion have been decried by various courts and commentators . . . we are bound to observe the Court's clear directive on this issue . . . The District Court found, and we agree, that since Spradlin and Mauk were on active-duty status at the time of the accident, the actions of their superiors and Lane were 'command decisions.' A challenge to these actions would require those superiors either in attendance at the party at which Lane became intoxicated or with knowledge of that gathering to testify about military decisions relating to the provision and/or consumption of alcohol on-base as well as disciplinary policies for infractions of such rules. It would also result in judicial prying into the knowledge or lack thereof of any unauthorized practices and would involve second guessing of military decisions and orders with respect to the operation of the installation." Major at 644-645.

[11]Petitioners did not contend on appeal that Helbig's drive home fell within the "special errand" exception to the "going and coming" rule.

whether under governing state law, an employee is acting within the scope of his employment at the time of the accident, and that under California's law of respondeat superior, Helbig had departed from the scope of his employment when the accident occurred:

> In the present case, the Appellants argue that Helbig was acting within the scope of his employment when he attended the Navy-sponsored party and drank several beers that had been purchased out of the Racine's Morale, Welfare and Recreation Fund. Because the Government concedes that the party was designed to boost morale and acknowledges that it benefited from Helbig's attendance, we agree that, under the "special errand" rule, Helbig was acting within the scope of his employment from the time that he traveled to the party until the time that he decided to leave... .
>
> We conclude, however, that Helbig substantially deviated from his employment purposes (i.e., attendance at the Navy-sponsored party) and was pursuing purely personal objectives once he decided to leave the party. . . . Specifically, Helbig departed from his employment purposes when he decided not to return directly home from the party but, instead, to drink a bottle of hard liquor in his car, drive several miles away from the base and his home, purchase additional alcohol at a downtown liquor store, and consume that alcohol — all over the course of an hour and one-half after leaving the party. . . .
>
> If Helbig had driven directly home from the party and been involved in an accident, he clearly would have been acting within the scope of his employment under the special errand rule and the Government would have been liable for any injuries that Helbig negligently inflicted. . . . However, Helbig's decision to deviate from his course home to embark on a "purely personal"

> mission constituted an abandonment of his employment purpose. . . . Accordingly, we conclude that Helbig's subsequent accident did not occur within the scope of his employment; therefore, the Navy is not vicariously liable for his tortious conduct.

(App. A5-A7.) (emphasis added)

INTRODUCTION

The lower courts' rejection of Count I of Petitioners' Complaint resulted from an interpretation of 28 U.S.C. § 1346(b)(1) which conflicts with the plain meaning of the language in the statute and is incompatible with prior holdings of both this Court and other federal Courts of Appeal: i.e., that the focal point of § 1346(b)(1) is the time that the negligent act or omission was committed, not the consequences of that negligence. Both the District Court and the Court of Appeals erroneously limited their determination of governmental liability to whether Helbig was acting within the scope of his employment at the time of the accident.

Petitioners respectfully submit that to determine the Government's vicarious liability under § 1346(b)(1), as well as an employer's vicarious liability under California's law of respondeat superior, a court must determine whether the employee was acting within the scope of his employment when he committed the act of negligence or became an instrument of danger to others. Because the Court of Appeals expressly found that Helbig's negligently consuming six to twelve beers was within the scope of his employment (App. A6), the only issue remaining under both § 1346(b)(1) and California respondeat superior law is whether Helbig's resulting intoxication was a proximate cause of the accident — a fact issue to be resolved at trial.

With respect to the lower courts' dismissal of Count II of their Complaint, Petitioners also ask the Court to hold that the Feres/Shearer doctrine does not immunize the Government from liability for the negligent acts of Helbig's superiors and the Shore Patrol in failing to take any action to prohibit Helbig's intoxicated departure from the base. Petitioners respectfully submit that the

rationale underlying the application of Feres/Shearer is not present where, as here, a service member can establish the Government's liability by relying solely upon the Government's own written internal investigative reports and findings. As a result, there is no need for a civilian court to interfere in military decisions involving the command, control, management and discipline of its service members, and the Feres/Shearer doctrine should not immunize the Government from liability.[12]

Finally, and in the alternative, Petitioners ask the Court to either abolish or modify the Feres/Shearer doctrine to preclude only those actions by service members which require a civilian court to evaluate claims of military negligence which occur in pursuit of some tangible military objective. Petitioners submit that such action is warranted for the reasons set forth by the dissent in United States v. Johnson, 481 U.S. 681, 107 S. Ct. 2063, 95 L. Ed. 2d 648 (1987) (Scalia, J. dissenting); see also Taber v. Maine, 67 F.3d 1029, 1032, 1037-1044 (2nd Cir. 1995); Hunt v. United States, 636 F.2d 580, 589 (D.C. Cir. 1980); Estate of McAllister v. United States, 942 F.2d 1473, 1475-1476, 1480 (9th Cir. 1991); Note, From Feres To Stencel: Should Military Personnel Have Access To FTCA Recovery?, 77 Mich. L. Rev. 1099 (1979).

Because the negligent actions of Helbig's superiors and the Shore Patrol in permitting Helbig to leave the base in an intoxicated condition were not committed in furtherance of any discrete military objective or purpose, the Government should not enjoy immunity from such negligence any more than it would be immunized if Helbig had injured a number of civilians on his drive home. See Doggett v. United States, 875 F.2d 684 (9th Cir. 1989); cf. e.g., Sheridan v. United States, 487 U.S. 392, 108 S. Ct. 2449, 101 L. Ed. 2d 352 (1988).

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[12]If Count II of Petitioners' Complaint is not barred by Feres/Shearer, the Government is responsible for the negligent actions of Helbig's superiors and the Shore Patrol under governing California law. See, e.g., Doggett v. United States, 875 F.2d 684 (9th Cir. 1989); cf. e.g., Sheridan v. United States, 487 U.S. 392, 401, 108 S. Ct. 2449, 101 L. Ed. 2d 352 (1988). See infra, p.25.

ARGUMENT

I. 28 U.S.C. § 1346(b)(1) REQUIRES A DISTRICT COURT TO APPLY THE RESPONDEAT SUPERIOR LAW OF THE STATE WHERE A NEGLIGENT ACT OR OMISSION OCCURRED NOT WHERE THE NEGLIGENT ACT OR OMISSION HAD ITS OPERATIVE EFFECT; BY PARITY OF REASONING, AS WELL AS THE EXPRESS LANGUAGE USED IN § 1346(b)(1), WHETHER A GOVERNMENT EMPLOYEE WAS ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT UNDER A GIVEN STATE'S RESPONDEAT SUPERIOR LAW MUST BE DETERMINED FROM AN EXAMINATION OF THE CIRCUMSTANCES EXISTING AT THE TIME OF THE NEGLIGENT ACT OR OMISSION, NOT THE CIRCUMSTANCES EXISTING AT THE TIME OF THE ACCIDENT.

Both this Court and various federal Courts of Appeal have held that 28 U.S.C. § 1346(b)(1) requires a district court to determine where a negligent act or omission occurred, not where the negligent act or omission had its operative effect, in order to ascertain what state law is to be applied in resolving the Government's respondeat superior liability for the negligence of its employees. See, e.g., Richards v. United States, 369 U.S. 1, 10, 82 S. Ct. 585, 591, 7 L. Ed. 2d 492 (1962); see also Brock v. United States, 601 F.2d 976, 978 (9th Cir. 1979); Roberts v. United States, 498 F.2d 520, 522 n.2 (9th Cir. 1974), cert. denied, 419 U.S. 1070, 95 S. Ct. 656, 42 L. Ed. 2d 665.

Given this well-established meaning of 28 U.S.C. § 1346(b)(1), it would seem apparent that in applying a given state's law of respondeat superior to determine the Government's vicarious liability for the negligence of a service member, the state's respondeat superior law must be applied to the circumstances attending the service member's alleged negligent act or omission, rather than be confined to those circumstances attending the resulting accident. This is evident from the plain meaning of

the language in § 1346(b)(1): "[T]he district courts shall have exclusive jurisdiction . . . on claims against the United States for . . . personal injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his . . . employment . . . ." (emphasis added)[13]

The statute unambiguously provides that the Government's liability is determined by examining whether a Government employee's negligence occurred while acting within the scope of his employment. The statute does not provide that this determination depends upon what the employee was doing at the time of the accident.

Nevertheless, both the District Court and the Court of Appeals limited their determination of the Government's vicarious liability for Helbig's negligence to the circumstances existing at the time of the accident, and concluded that Helbig was not acting within the scope of his employment when he drove his car into the back of the tractor-trailer. If California's respondeat superior law had been applied to the circumstances existing when Helbig committed the negligent act of becoming intoxicated at the on-base party, which undisputedly occurred within the scope of Helbig's employment, the Government would be vicariously liable for the accident so long as Helbig's intoxication was a proximate cause of the ensuing accident. See cases cited supra, pp. 9-12.

The present situation is similar to that in Sheridan v. United States, 487 U.S. 392, 108 S. Ct. 2449, 101 L. Ed. 2d 352 (1988), where civilians brought an action under the FTCA for injuries sustained when an obviously intoxicated off-duty serviceman fired several shots into an automobile. The action was based upon the alleged negligence of Navy corpsmen to prevent the serviceman's use of the rifle. While it was apparent that the Government had no vicarious liability for the acts of the serviceman at the time plaintiffs were injured because the serviceman's actions were not undertaken within the scope of his employment, a viable FTCA action

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[13]Referring to § 1346(b)(1), this Court observed in Richards, supra, 369 U.S. at 10: "We are bound to operate within the framework of the words chosen by Congress . . . ."

was nevertheless stated for the independent acts of negligence by the corpsmen in failing to prevent the serviceman's use of the rifle. This was true even though but for the serviceman's firing the rifle into the automobile, there would have been no injury and hence no governmental liability:

> (T)he (FTCA) covers actions for personal injuries "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment" . . . . We need only move the emphasis to the next phrase "while acting within the scope of his office or employment" — to apply the (the) analysis to the assault and battery committed by the off-duty, inebriated enlisted man in this case. If nothing more was involved here than the conduct of Carr at the time he shot at petitioners, there would be no basis for imposing liability on the Government. The tortious conduct of an off-duty serviceman, not acting within the scope of his office or employment, does not in itself give rise to government liability whether that conduct is intentional or merely negligent.
>
> As alleged in this case, however, the negligence of other Government employees who allowed a foreseeable assault and battery to occur may furnish a basis for Government liability that is entirely independent of Carr's employment status. By voluntarily adopting regulations that prohibit the possession of firearms on the Naval base and that require all personnel to report the presence of any such firearm, and by further voluntarily undertaking to provide care to a person who was visibly drunk and visibly armed, the Government assumed responsibility to "perform its 'good samaritan' task in a careful manner" . . . .

Sheridan, 487 U.S. at 400-402. Because independent acts of negligence were involved, the fact that the act of negligence immediate-

ly causing the accident was not committed within the scope of employment did not preclude the Government's liability for a separate and more remote act of negligence which was a proximate cause of the later injuries. The same is true in this case. Helbig's initial and independent act of negligence is the basis of the Government's liability under Section 1346 (b)(1).

The lower courts' dismissal of Count I also cannot be reconciled with the decision of the Second Circuit Court of Appeals in Taber v. Maine, 67 F.3d 1029 (2nd Cir. 1995). In Taber, an intoxicated Navy serviceman who was on liberty and had been drinking at an on-base party collided with another off-duty serviceman after leaving the base. Applying California's law of respondeat superior to the facts underlying the serviceman's intoxication, the Second Circuit upheld the Government's respondeat superior liability, despite the fact that the driver was pursuing his own personal agenda, i.e., was engaged in a "frolic," at the time of the accident, and thus would not be deemed to be acting within the scope of his employment.

The Court noted that under California's respondeat superior law, as expressed in Rodgers and Childers, if the service member's consumption of alcohol was within the scope of employment, the Government was responsible for any accident proximately caused by the service member's intoxication despite the fact that he would not otherwise be considered to be acting within the scope of his employment at the time of the accident:

> Rodgers and Childers held that the employer benefit requirement is met whenever broad potential effects on morale and customer relations exist, or where the employer has implicitly permitted or endorsed the recreational practices that led to the harm. . . .
>
> Of course drinking by service members can be viewed as important to military morale, just as drinking was apparently instrumental to good employee morale and customer relations in Rodgers and Childers. Hence, "employer benefit"

> can be adduced in all these cases. But in the end, "employer benefit" is significant only because it is one way of showing that the harm that drinking causes can properly be considered a cost of the employer's enterprise.
>
> Here, it is undisputed that drinking on base during off-duty hours was a commonplace, if not an officially condoned, activity. It certainly was a customary incident of Maine's employment relationship with the Navy, as that element is described in Rodgers. . . . and in the context of the military mission, an occasional drunken service member who leaves Government premises and causes damage is a completely foreseeable event, in the sense that is a reasonably obvious risk the general enterprise. As such, we do not think that it would be unfair or the slightest bit unreasonable to impose that cost on the Government. To the contrary, given the pervasive control that the military exercises over its personnel while they are on a base, it is totally in keeping with the doctrine of respondeat superior to allocate the costs of the base operations to the Government. . . . And this is so quite apart from whether or not the military benefits from the boosted morale achieved through fairly lenient on-base drinking policies.

Taber at 1036-1037.

The Court of Appeals' decision in this case cannot be reconciled with the plain meaning of § 1346(b)(1), with decisions of this Court and other federal courts of appeal, or with California respondeat superior law which focuses on whether an employment-related negligent act or dangerous condition caused the accident. Regardless of Helbig's status at the time of the accident, i.e., whether or not he was acting within the scope of his employment, there is an independent basis for the Government's respondeat superior liability in this case — that is, Helbigg's negligent consumption of alcohol within the scope of his employment. If

Helbig's consumption of alcohol within the scope of his employment acted as a proximate cause of the accident and injury to Petitioners, the Government is vicariously liable under § 1346(b)(1) and California law.[14]

II. COUNT II OF PETITIONERS' COMPLAINT SHOULD NOT HAVE BEEN DISMISSED UNDER THE FERES/SHEARER DOCTRINE BECAUSE ADJUDICATION OF THAT CLAIM COULD HAVE TAKEN PLACE BY PETITIONERS' RELYING SOLELY UPON THE NAVY'S OWN INVESTIGATIVE REPORTS AND FINDINGS TO ESTABLISH THE NEGLIGENCE OF HELBIG'S SUPERIORS AND THE SHORE PATROL, THUS PRECLUDING THE DISTRICT COURT FROM HAVING TO INQUIRE INTO MILITARY DECISIONS INVOLVING THE COMMAND, CONTROL, MANAGEMENT, AND DISCIPLINE OF ITS SERVICE MEMBERS.

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[14]Under California's law of respondeat superior, even if Helbig's consumption of alcohol at the on-base party were somehow not deemed negligent despite Helbig's knowledge that he would be driving his automobile upon leaving the party, under California's "special risk" doctrine, the mere fact that Helbig became an instrumentality of danger to others while acting within the scope of his employment would render his employer liable for any injuries proximately caused by the special risk that was created during the scope of his employment. See, e.g., Carr v. Wm. C. Crowell, 28 Cal. 2d 652, 171 P.2d 5 (1946); Rodgers v. Kemper Constr. Co., 50 Cal. App. 3d 608, 124 Cal. Rptr. 143 (Ct. App. 1975); White v. County of Orange, 166 Cal. App. 3d 566, 212 Cal. Rptr. 493 (Ct. App. 1985); Mary M. v. City of Los Angeles, 285 Cal. Rptr. 99, 814 P.2d 1341 (1991); Lisa M. v. Henry Mayo Newhall Mem. Hosp., 48 Cal. Rptr. 2d 510, 907 P.2d 358 (1995); Farmer's Ins. Group v. County of Santa Clara, 47 Cal. Rptr. 2d 478, 906 P.2d 440 (1995); McCarty v. Workmens' Compensation Appeals Board, 117 Cal. Rptr. 65, 527 P.2d 617 (1974); Childers v. Shasta Livestock Auction Yard, Inc., 190 Cal. App. 3d 792, 235 Cal. Rptr. 641 (Ct. App. 1987); Henriksen v. City of Rialto, 20 Cal. App. 4th 1612, 25 Cal. Rptr. 2d 308 (Ct. App. 1993); Comment, Employer Liability For A Drunken Employee's Actions Following An Office Party: A Cause Of Action Under Respondeat Superior, 19 Cal. W. L. Rev. 107 (1982).

The District Court, relying on United States v. Shearer, 473 U.S. 52, 105 S. Ct. 3039, 87 L. Ed. 2d 38 (1985), and Major v. United States, 835 F.2d 641 (6th Cir. 1987), held that Count II of Petitioners' Complaint was subject to dismissal because it would require the Court to inquire into military decisions involving the command, control, management, and discipline of its service members.

In its investigative report, the Navy found that nothing had been done to discourage underaged drinking at the party, that little had been done to prevent intoxicated personnel from leaving the base in their vehicles, that the Commanding Officer had failed to ensure that state and local alcohol laws were enforced, that the Executive Officer had failed to ensure that proper and adequately trained personnel were assigned to Shore Patrol, that the Chief Engineer had failed to properly supervise the planning and execution of the party and that other officers had failed to provide proper supervision. The Navy also determined that a proximate cause of the accident was the Navy's chain of command negligently providing alcohol to Helbig and allowing Helbig to drive off base in an intoxicated condition.

Although the Court has never ruled on this issue, Petitioners submit that where a service member can present his negligence case against the Government based upon the latter's own written investigative reports and findings, the danger of impermissible judicial inquiry into military decisions involving the command, control, management, and discipline of service members identified in Shearer is not present, and thus a cause of action so limited in scope should be permitted to proceed under the FTCA. Because, absent a Shearer bar, Count II of Plaintiffs' Complaint stated a viable cause of action against the Government for the negligence of Helbig's superiors, as well as the Shore Patrol, see, e.g., Doggett v. United States, 875 F.2d 684 (9th Cir. 1989), Petitioners respectfully request that the Court grant their petition.

III. THE COURT SHOULD EITHER OVERRULE THE "FERES/SHEARER DOCTRINE" OR, ALTERNATIVELY, LIMIT ITS SCOPE TO CASES INVOLVING SERVICE-RELATED INJURIES CAUSED BY MILITARY NEGLI-

GENCE WHICH OCCURS IN PURSUIT OF SOME PALPABLE MILITARY OBJECTIVE.

Petitioners submit that for the reasons set forth by the dissenting opinion in United States v. Johnson, 481 U.S. 681, 107 S. Ct. 2063, 95 L. Ed. 2d 648 (1987) (Scalia, J. dissenting), the so-called "Feres/Shearer doctrine" should either be abolished or substantially modified such that only those actions against the Government which would require the judiciary to review military judgments undertaken in pursuit of some palpable military objective should be barred. See also Taber v. Maine, 67 F.3d 1029 (2nd Cir. 1995).

Because Count II of Petitioners' Complaint, in which petitioners seek to hold the Government liable for the military's failure to properly supervise intoxicated service members so as to prevent their departure from an on-base party, and thus prevent substantial risk to the public, involves no exercise of military judgment relat-

ed to the pursuit of any discrete military objective, Petitioners respectfully request that the Court grant their petition for this additional reason.

CONCLUSION

WHEREFORE, having demonstrated that the Court of Appeals, in dismissing Count I of Petitioners' Complaint, has misconstrued and misapplied the FTCA in contravention of prior decisions of this Court, various federal Courts of Appeal, and the highest courts of a number of states, including California's, and because Petitioners have demonstrated that Count II of their Complaint should not have been dismissed under the "Feres/Shearer" doctrine, Petitioners pray that this Court will accept jurisdiction over this matter and review the decision below.

Respectfully submitted,

David E. Jarvis
Counsel of Record
Thomas Armstrong
QUARLES & BRADY
411 East Wisconsin Avenue
Milwaukee, WI 53202-4497
(414) 277-5000

John C. Cabaniss
LAW OFFICE OF JOHN C. CABANISS
Suite 725
250 East Wisconsin Avenue
Milwaukee WI 53202
(414) 278-6066

Counsel for Petitioners

APPENDIX

Unpublished Opinion of the United States Court of Appeals for the Sixth Circuit Affirming the District Court's Granting of Summary Judgment in Favor of the Government. A1-A8

Mandate of the United States Court of Appeals for the Sixth Circuit B1

Order of the United States Court of Appeals for the Sixth Circuit Denying Rehearing C1

Opinion of the United States District Court for the Western District of Michigan Denying the Government's Motion to Dismiss in Part, and Granting it in Part D1-D6

Order of the United States District Court for the Western District of Michigan Denying the Government's Motion to Dismiss in Part, and Granting it in Part E1

Opinion of the United States District Court for the Western District of Michigan Granting the Government's Motion for Summary Judgment F1-F11

Order and Judgment of the United States District Court for the Western District of Michigan G1

NOT RECOMMENDED FOR PUBLICATION

No. 96-1500

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JEFFREY BISEL and DENNIS ROEHM,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.
_____/

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

BEFORE: GUY, MOORE, and COLE, Circuit Judges.

R. GUY COLE, Jr., Circuit Judge. Plaintiffs-Appellants Jeffrey Bisel and Dennis Roehm (collectively, "the Appellants") appeal the district court's grant of summary judgment in favor of the United States in their suit alleging violations of the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 1271-80. For the following reasons, we **AFFIRM** the judgment of the district court.

I.

On March 8, 1991, William Helbig and the Appellants were active-duty sailors in the United States Navy assigned to the Engineering Department of the U.S.S. Racine. Although the Appellants both resided on the Racine, Helbig resided in military family quarters a short distance from Naval Station Long Beach (NSLB) in California. While the Racine was docked at NSLB, the Engineering Department held a party at the naval station's recreation area at which soda and beer were furnished out of the

Racine's Morale, Welfare and Recreation Fund. All three sailors attended the party because they were on "liberty leave"[1] at the time and were not scheduled to return to duty until the next morning.

Between 12:00 p.m. and 2:30 p.m., Helbig attended the party and consumed approximately six to twelve cans of beer. As he prepared to leave, Helbig was joined by the Appellants. The three sailors agreed to buy some beer and return to Helbig's family quarters. Before leaving the parking lot, the sailors sat in Helbig's car and drank the entire contents of a small bottle of hard liquor that Roehm provided them. With Helbig driving, the sailors traveled approximately eight miles over a period of fifteen to twenty minutes to an off-post liquor store in Long Beach and purchased a twelve-pack of beer.

At approximately 4:00 p.m., an hour and a half after they left the party, Helbig and the Appellants were involved in an off-post automobile accident in which the Appellants were severely injured. Long Beach Police responding to the scene observed several empty beer cans on the floor of the vehicle and found the remainder of the twelve-pack unopened in the rear section of the passenger compartment. Helbig was subsequently convicted in California civilian court for driving under the influence of alcohol and was administratively discharged from the Navy with an Other-Than-Honorable Discharge.

In 1992, the Navy found the Appellants completed disabled from their injuries and determined that the injuries were suffered in the line of duty. Bisel and Roehm were ultimately awarded one-hundred percent disability compensation from the Department of Veteran Affairs and were honorably discharged on October 23, 1992, and February 2, 1993, respectively. The Appellants current receive hospital, nursing, and outpatient care from the Department.

On February 22, 1994, Bisel and Roehm filed the present suit in the United States District Court of the Western District of Michigan under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 1271-80. Alleging that Helbig was acting in the scope of

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[1] "Liberty leave" is akin to a weekend day-off.

his employment when he injured them, the Appellants sought recovery from the United States under the doctrine of respondeat superior.[2] On February 13, 1996, the district court held that Helbig was not acting within the scope of his employment at the time of the accident and, thus, concluded that it did not possess subject matter jurisdiction under the FTCA to adjudicate the Appellants' suit. Therefore, the district court granted the Government's motion for summary judgment and dismissed the Appellants' complaint.

Bisel and Roehm have timely appealed the judgment of the district court.

II.

We review de novo a district court's grant of summary judgment, using the same standard employed by the district court. *Moore v. Philip Morris Cos.*, 8 F.3d 335, 339 (6th Cir. 1993); *Kraus v. Sobel Corrugated Containers, Inc.*, 915 F.2d 227, 229 (6th Cir. 1990). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In deciding upon a motion for summary judgment, we must review the evidence and draw all reasonable inferences therefrom in favor of the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

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[2] Bisel and Roehm also alleged that the Navy was liable for its own negligence in (1) serving alcohol to Helbig and (2) allowing him to drive an automobile off the base while intoxicated. On September 22, 1994, the district court dismissed this allegation under the so-called "*Feres* doctrine." *See Feres v. United States*, 340 U.S. 135, 146 (1950) (holding that a serviceman may not recover under the FTCA for injuries that "arise out of or are in the course of activity incident to military service"). In recent years, the *Feres* doctrine has been expanded to prevent any civilian court from "second-guessing" military decisions regarding the discipline, supervision, and control of its servicemen. *See United States v. Shearer*, 473 U.S. 52, 58 (1985) (holding that a soldier's negligence claim was barred under the *Feres* doctrine because it required a civilian court to review the wisdom of a command decision). Bisel and Roehm preserve this issue only for possible review by the Supreme Court.

III.

The Appellants contend that the district court erred in granting the United States summary judgment as to their claims under the FTCA because Helbig was acting within the scope of his employment when he became intoxicated at the Navy-sponsored party. Specifically, the Appellants argue that Helbig's trip to purchase additional alcohol after leaving the party and subsequent accident were the foreseeable consequences of his being served alcohol at that party. We disagree.

Pursuant to 28 U.S.C. § 1346(b)(1), a district court possesses jurisdiction to hear an FTCA suit when the claimed injury was

> caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

For military personnel, the phrase "scope of ... employment" is equated with "acting in [the] line of duty," *see* 28 U.S.C. § 2671, and "line of duty" is defined by the state law of respondeat superior. *See Williams v. United States*, 350 U.S. 857 (1955). Thus, because this accident occurred in California, the district court could only exercise jurisdiction over the Appellants' complaint if, under California law, a private employer would have been liable for Helbig's actions under the doctrine of respondeat superior. *See* 28 U.S.C. § 1346(b)(1); *Flechsig v. United States*, 991 F.2d 300, 302-03 (6th Cir. 1993) (holding that district court has no jurisdiction to hear matters brought under the FTCA if the employee was acting outside the scope of employment); *see also Chancellor v. United States*, 1 F.3d 438, 440 (6th Cir. 1993).

Under the doctrine of respondeat superior, an employer is vicariously liable for the torts of its employees committed within the scope of their employment. *See Lisa M. v. Henry Mayo Newhall Mem'l Hosp.*, 907 P.2d 358, 360 (Cal. 1995); *Farmers Ins. Group v. County of Santa Clara*, 906 P.2d 440, 448 (Cal. 1995). Generally,

an employee is outside the scope of his employment during his ordinary commute to and from his place of work. *See Anderson v. Pacific Gas & Elec. Co.*, 17 Cal. Rptr. 2d 534, 536 (Ct. App. 1993); *Felix v. Asai*, 237 Cal. Rptr. 718, 721 (Ct. App. 1987). However, if the employee's trip is made at the request of his employer or "involves an incidental benefit to the employer, not common to commute trips by ordinary members of the work force," *Himman v. Westinghouse Elec. Co.*, 471 P.2d 988, 991 (Cal. 1970), the employee is considered to be acting within the scope of his employment from the time that he starts on the "special errand" until he has returned or deviated therefrom for personal reasons. *See Boynton v. McKales*, 294 P.2d 733, 740 (Cal. Ct. App. 1956).

This rule, known as the "special errand" rule, has been interpreted to include an employee's attendance at a social function "if the function or the attendance was connected with the employment and for a material part intended to benefit the employer who requested or expected the employee to attend." *Boynton*, 294 P.2d at 741; *see also McCarty v. Workmen's Compensation Appeals Bd.*, 527 P.2d 617, 619-20 (Cal. 1974) ("Employee social and recreational activity on the company premises, endorsed with the express or implied permission of the employer, fails within the course of employment if the 'activity was conceivably of some benefit to the employer ....'" (citations omitted)). Accordingly, if an employee becomes intoxicated at a company-sponsored social function where alcohol is furnished and injures himself or another on his way home, the employee is considered to be acting within the scope of his employment and the employer may be held liable for the employee's tortious conduct. *See McCarty*, 527 P.2d at 618 (holding that an employee's death from a drunken-driving accident occurred within the scope of employment because employee became intoxicated at company party at which the employer permitted and encouraged alcohol consumption); *Boynton*, 294 P.2d at 742 (holding that an employer could be held liable for injuries plaintiff suffered when struck by drunken employee returning home from company banquet); *see also Harris v. Trojan Fireworks Co.*, 174 Cal. Rptr. 452, 456-57 (Ct. App. 1981).

In the present case, the Appellants argue that Helbig was acting within the scope of his employment when he attended the

Navy-sponsored party and drank several beers that had been purchased out of the Racine's Morale, Welfare and Recreation Fund. Because the Government concedes that the party was designed to boost morale and acknowledges that it benefitted from Helbig's attendance, we agree that, under the "special errand" rule, Helbig was acting within the scope of his employment from the time that he traveled to the party until the time that he decided to leave. *See McCarty*, 527 P.2d at 619-20; *Boynton*, 294 P.2d at 742.

We conclude, however, that Helbig substantially deviated from his employment purposes (i.e., attendance at the Navy-sponsored party) and was pursuing purely personal objectives once he decided to leave the party. *See Boynton*, 294 P.2d at 740 (holding that, under the "special errand" rule, an employee acts within the scope of his employment until the time he returns from that errand "or until he deviates therefrom for personal reasons"); *see also Bailey v. Filco, Inc.*, 56 Cal. Rptr. 2d 333, 336 (Ct. App. 1996) ("[R]espondeat superior liability is inapplicable when an employee has substantially deviated from his or her duties for personal purposes.") Specifically, Helbig departed from his employment purposes when he decided not to return directly home from the party but, instead, to drink a bottle of hard liquor in his car, drive several miles away from the base and his home, purchase additional alcohol at a downtown liquor store, and consume that alcohol — all over the course of an hour and a half after leaving the party. *See Felix*, 237 Cal. Rptr. at 723 (holding that an employee who finished delivering mail to the post office for his employer had "completely abandoned his employer's business" and begun "pursuing a purely personal objective' when he decided to drive to his parents' house for dinner rather than driving directly home).

If Helbig had driven directly home from the party and been involved in an accident, he clearly would have been acting within the scope of his employment under the special errand rule and the Government would have bene liable for any injuries that Helbig negligently inflicted. *See McCarty*, 527 P.2d at 618; *Harris*, 174 Cal. Rptr. at 456-57; *Boynton*, 294 P.2d at 742. However, Helbig's decision to deviate from his course home to embark on a "purely personal" mission constituted an abandonment of his employment purpose. *See Le Elder v. Rice*, 26 Cal. Rptr. 2d 749, 751 (Ct. App.

1994) ("Where the employee's conduct has substantially deviated from his or her duties, it is unjust to hold the employer liable .... [If the] main purpose of [the] injury-producing activity ... was the pursuit of the employee's personal ends, the employer is not liable." {citations omitted)); *Felix*, 237 Cal. Rptr. at 723; *Boynton*, 294 P.2d at 742. Accordingly, we conclude that Helbig's subsequent accident did not occur within the scope of his employment; therefore, the Navy is not vicariously liable for his tortious conduct.

Nevertheless, the Appellants maintain that an employer is liable, under the doctrine of respondeat superior, for all "foreseeable consequences" of its business enterprise. *See Rodgers v. Kemper Constr. Co.*, 124 Cal. Rptr. 143, 148 (Ct. App. 1975); *see also Childers v. Shasta Livestock Auction Yard, Inc.*, 235 Cal. Rptr. 641, 647 (Ct. App. 1987) ("[The foreseeability test of] respondeat superior liability is properly applied where an employee undertakes activities within the scope of his or her employment that cause the employee to become an instrumentality of dangers to others even where the danger may manifest itself at times and locations remote from the ordinary workplace."). Specifically, the Appellants note that, in the context of respondeat superior, "'foreseeability' ... merely means that ... an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business." *Rodgers*, 124 Cal. Rptr. at 149. Thus, the Appellants argue that, under this "foreseeability test," the Government is vicariously liable for Helbig's alleged negligence because Helbig's detour to purchase additional alcohol and subsequent accident were foreseeable results of his being served alcohol at the Navy-sponsored party.

Although the Appellants correctly stated the "foreseeability test" applied by California courts to determine the scope of an employer's liability under the doctrine of respondeat superior, the Appellants misconstrue the test as a separate basis for imposing liability on the Government in this case. As the California Court of Appeals has explained:

> One traditional means of defining this foreseeability is see in the distinction between minor "deviations" and substantial "departures" from the employer's business. The former are deemed fore-

> seeable and remain within the scope of employment; the latter are unforeseeable and take the employee outside the scope of his employment.

Lazar v. Thermal Equip. Corp., 195 Cal. Rptr. 890, 893 (Ct. App. 1983); *see Bailey*, 56 Cal. Rptr. 2d at 339 ("The central part of [the foreseeability] inquiry asks whether [the employee's] trip ... was a 'minor deviation' and foreseeable or a 'substantial departure' and unforeseeable."). Because we have already determined that Helbig's trip to purchase additional alcohol was a substantial departure from his employment purposes, we conclude that the trip was unforeseeable as well. *See Lazar*, 195 Cal. Rptr. at 893; *Bailey*, 56 Cal. Rptr. 2d at 339.

IV.

For the stated reasons above, we hereby **AFFIRM** the district court's grant of summary judgment. Due to our disposition of this matter, we need not reach the remaining issues presented by parties for review.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 96-1500

Filed: August 22, 1997

JEFFREY BISEL; DENNIS ROEHM

Plaintiffs - Appellants

v.

UNITED STATES OF AMERICA

Defendant - Appellee

MANDATE

Pursuant to the court's disposition that was filed 7/22/97 the mandate for this case hereby issues today.

A True Copy.

COSTS: N O N E

Attest:

Filing Fee.....$
Printing.....$

Total .....$

_____
Deputy Clerk

Case No: 96-1500

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

JEFFREY BISEL; DENNIS ROEHM

Plaintiffs - Appellants

v.

UNITED STATES OF AMERICA

Defendant - Appellee

BEFORE: GUY, MOORE, and COLE, Circuit Judges

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

NORTHERN DIVISION

JEFFREY BISEL AND DENNIS ROEHM,
Plaintiffs,

File No. 2:94-CV-44

v.

HON. ROBERT HOLMES BELL

UNITED STATES OF AMERICA,
Defendant.

_____/

OPINION

Plaintiffs Jeffrey Bisel and Dennis Roehm, two former servicemen, filed this action against the United States of America under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), for injuries received in an automobile accident. The government has filed a motion to dismiss for lack of subject matter jurisdiction.

I.

Plaintiffs ENFN Bisel and DC3 Roehm, allege in their complaint that on March 8, 1991, they attended an on-base party sponsored by the Engineering Department of the U.S.S. Racine. ENFA Helbig, who was not of legal drinking age and who had a history of alcohol-related problems/abuse while in the Navy, was served alcohol at the party and was allowed to leave the party although visibly intoxicated. Plaintiffs left the party with Helbig in Helbig's private vehicle. The vehicle was involved in an accident and Plaintiffs were severely injured.

Plaintiffs allege in Count I that Helbig, acting within the scope

of his employment, negligently caused the collision. In Count II they allege that Navy personnel negligently failed to prevent Helbig's consumption of alcoholic beverages at the base party and negligently allowed Helbig, while in an intoxicated condition, to leave the base in his automobile.

II.

The FTCA authorizes damages suits against the United States for injuries caused by the tortious conduct of any federal employee acting within the scope of his employment, to the same extent that a private person would be liable under state law. 28 U.S.C. § 1346(b).

For purposes of this motion, the government will assume that Helbig was acting within the scope of his employment at the time of the accident. The government contends, however, that Plaintiffs' action is barred by the doctrine set forth in Feres v. United States, 340 U.S. 135 (1950). The Feres doctrine, also known as the "intra-military tort immunity doctrine," bars actions by service members "where the injuries arise out of or are in the course of activity incident to service." Id. at 145; Verma v. United States, 19 F.3d 646, (D.C. Cir. 1994). The doctrine has been expanded to bar any action by a serviceman where adjudication of the claim would require impermissible judicial inquiry into military decisions involving the command, control, management and discipline of its service members. United States v. Shearer, 473 U.S. 52, 58 (1985).

The Sixth Circuit has adopted a broad view of what activities are considered "incident to service:"

> [I]n recent years the court has embarked on a course dedicated to broadening the Feres doctrine to encompass, at a minimum, all injuries suffered by military personnel that are even remotely related to the individual's status as a member of the military, without regard to the location of the event, the status (military or civilian) of the tortfeasor, or any nexus between the injury-producing event and the essential defense/combat purpose of the military activity from which it arose.

Major v. United States, 835 F.2d 641, 644-45 (6th Cir. 1987), cert. denied, 487 U.S. 1218 (1988) (emphasis in original).

In Major the Sixth Circuit dismissed as Feres-barred a negligent supervision claim involving a serviceman who became intoxicated at an on-base party and ran his vehicle into two off duty service members. In Sidley v. United States, 861 F.2d 988 (6th Cir. 1988), the Sixth Circuit held that Plaintiff's negligent medical treatment claim against Navy doctors was Feres barred. The Court noted that the term "incident to service" extends beyond situations where the soldier is acting pursuant to orders or while subject to direct military command or discipline. Id. at 990.

Plaintiffs concede that under current law Court II of their complaint, which alleges negligence on the part of Navy personnel, is barred by the Feres doctrine. Defendant's motion to dismiss will be granted as to Count II.

Plaintiffs argue, however, that Count I is not similarly barred because governmental liability in count I is premised upon respondeat superior and not on the government's own negligence.

Defendant asserts that Count I is premised upon military decisions regarding supervision, control and granting of privileges to another servicemember. The Court disagrees. Count I mentions that Helbig got drunk at a party on base, but the negligence alleged is the negligence of Helbig, not the military. While Count I does not specifically state that it is premised upon a theory of respondeat superior, it reads like a respondeat superior claim, that is how it is being argued by the Plaintiffs, and that is how it is construed by the Court.

The Court must turn, then, to the question of whether a respondeat superior claim as alleged in Count I is barred by the Feres doctrine. While the Feres doctrine is broad, it has never been held to bar all military personnel lawsuits. Elliott v. United States, 13 F.3d 1555, 1558 (11th Cir. 1994).

The Supreme Court in Shearer recognized the continued vitality of the doctrine enunciated in Brooks v. United States, 337 U.S. 49 (1949). In Brooks the Court allowed a serviceman recovery

under the FTCA for injuries caused by a negligent driver of a military truck. The Shearer Court differentiated the negligent supervision case before it from Brooks. "Unlike the negligence alleged in the operation of a vehicle, the claim here would require Army officers 'to testify in court as to each other's decisions and actions.'"

473 U.S. at 58.

In Sidley the Sixth Circuit observed that "generally an off-duty serviceman not on the military base and not engaged in military activity at the time of injury can recover under the FTCA." 861 F.2d at 990. This general rule is more clearly articulated by the Fifth Circuit in Kelly v. Panama Canal Comm'n, 26 F.3d 597 (5th Cir. 1994). The court stated that it considers three factors in determining the applicability of Feres:

> 1) duty status, 2) where the injury occurred, and 3) the activity being performed. After applying these three factors, we consider the totality of the circumstances to determine whether the serviceman was acting "incident to service."

Id. at 600. Accord Elliott, 13 F.3d at 1560-61.

Applying this test in Kelly, the Fifth Circuit determined that a wrongful death action brought by an army officer's widow against the Panama Canal Commission was not barred by Feres.

> Captain Kelly was off-duty, off-base and engaged in a purely leisure activity that served no military purpose or function. Unlike the situation in Shearer, Kelly's suit does not affect military discipline or involve military judgment. Instead, the suit involves the Panama Canal Commission's negligence in hanging electrical wires in the path of recreational sailors.

26 F.3d at 601.

The same factors were considered in Green v. Hall, 8 F.3d 695 (9th Cir. 1993), pet. for cert. filed, 62 USLW 3775 (May 9, 1994).

Green was injured while a passenger in Army Reservist Coffman's car after leaving base with Coffman to eat breakfast or to get doughnuts for others. Green sued Coffman's estate, and the estate added the United States, under the theory that Coffman was acting within the scope of his employment at the time of the accident. The Ninth Circuit held that Green's suit was not barred by the Feres doctrine because he was not injured "incident to service." He was injured while off base and before he was due at morning formation. "His injuries were therefore related to his military status only 'in the sense that all human events depend upon what has already transpired,' which is insufficient." Id. at 700. His trip was also a "distinctly nonmilitary act" since it was not done under orders, was not intended to benefit the military, and did not occur on military property. Id. Accord, Jayson, Handling Federal Tort Claims § 5A.02, pp. 5A-12 ("If the serviceman's injury or loss occurs while he is off duty, while he is not within the physical confines of his military base, while he is not engaged in any military mission, and is not directly under military discipline, it is likely that the Brooks doctrine allowing Tort Claim Act recovery will apply; in other words, that the injury or loss will be regarded as not incident to service.")

Count I of the case before this Court falls squarely within Brooks, Kelly and Green. The only negligence alleged in Count I is the negligence of Helbig, the driver. The accident occurred while Plaintiffs were engaged in a "distinctly nonmilitary act" off base while Plaintiffs were off duty and not subject to military control. Count I will not require the Court to inquire into military decisions involving the command, control, management and discipline of its service members. Count I, alleging respondeat superior, is not barred by the Feres doctrine. Accordingly, Defendant's motion to dismiss will be denied as to Count I.

The Court observes, however, that Plaintiffs face a difficult burden of establishing that Helbig was acting within the scope of his employment at the time of the accident. The concept of "incident to service" is generally recognized as being broader than the "scope of employment" test used for respondeat superior purposes. Handling Federal Tort Claims, § 5A.02, pp. 5A-37 to 5A-38. Accordingly, if a servicemen is acting within the scope of his employment, his conduct is by definition also incident to service.

Having alleged that Plaintiffs were not acting "incident to service" at the time of the accident Plaintiffs may find it difficult to show that Helbig's activity was within the "scope of employment" at the time of the accident.

III.

In sum, the Court finds that Count II of Plaintiff's complaint is barred by the Feres doctrine. Because the Court lacks jurisdiction over Count II, the government's motion with respect to Count II is granted and Count II will be dismissed. Because Count I of Plaintiffs' complaint is not barred by either Feres or Shearer, the government's motion to dismiss Count I is denied.

An order consistent with this opinion will be entered.

Date:_____

_____

ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JEFFREY BISEL and DENNIS ROEHM,

Plaintiffs,

File No. 2:94-CV-44

v.

HON. ROBERT HOLMES BELL

UNITED STATES OF AMERICA,

Defendant.

_____/

ORDER

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that the government's motion to dismiss (Docket # 5) is **GRANTED IN PART** and **DENIED IN PART.** The motion is **GRANTED** as to Count II, and **DENIED** as to Count I.

IT IS FURTHER ORDERED that Count II is **DISMISSED** for lack of jurisdiction.

Date: _____

_____
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

NORTHERN DIVISION

JEFFREY BISEL and DENNIS ROEHM,

Plaintiffs,

Case No. 2:94-CV-44

v.

HON. ROBERT HOLMES BELL

UNITED STATES OF AMERICA,

Defendant.

_____/

OPINION

In this action two former United States Navy sailors seek to hold the United States vicariously liable under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), for the actions of another sailor whose negligence, they contend, caused them to suffer injuries in an automobile accident.[1] This matter is currently before the Court on the government's motion for summary judgment.

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[1] By opinion and order dated September 22, 1994, this Court dismissed Count II of Plaintiffs' complaint which alleged negligence on the part of the government. Only Count I which alleges liability on the basis of respondeat superior remains.

The government contends that the Court lacks jurisdiction over this matter because (1) the alleged acts or omissions of ENFA Helbig occurred outside his "scope of employment" as defined by applicable California State law; (2) Plaintiffs were injured "incident to service," and hence this action is barred under Feres v. United States, 340 U.S. 135 (1950); and (3) this action challenges military decisions regarding the command, control, and supervision of ENFA Helbig, an active-duty sailor, and hence is barred under United States v. Shearer, 473 U.S. 52 (1985).

I.

The government has attached a Statement of Material Facts to its motion for summary judgment. With the exception of the government's statement that Helbig consumed 6 beers at the Engineering party, (Plaintiffs contend there is evidence that he consumed 10-12 beers), Plaintiffs agree with the government's statement of material facts. For purposes of this motion, then, the Court will accept the facts stated by the government, leaving open the issue as to the number of beers consumed by Helbig at the party. A summary of the facts follows:

On March 8, 1991, Plaintiff Jeffrey Bisel, Plaintiff Dennis Roehm and Fireman Apprentice ENFA William Helbig were all active duty sailors in the United States Navy, assigned to the Engineering Department of the U.S.S. Racine. The U.S.S. Racine was docked at the Naval Station Long Beach ("NSLB"). Both Plaintiffs resided on the U.S.S. Racine. Helbig resided in military family quarters a short distance from NSLB. Helbig's usual commuting route between his military family quarters and NSLB was via Route 47, the Terminal Island Freeway, with an average travel time of approximately five minutes.

On March 8, 1991, the Engineering Department held a party at Mole Park, a recreation area located on NSLB. Beer and soda were served at the party. Helbig, Bisel and Roehm were in a "liberty status" while they attended the party. All three consumed beer at the party. By doing so they all violated California law since they were under the legal drinking age of 21.

Helbig left the Engineering party no later than 2:30 p.m. with the intention of going home and possibly returning with his wife. As he left the party he was joined by Bisel and Roehm. The three sailors agreed to buy some beer, then return to Helbig's military family quarters. They got in Helbig's car and drank the entire contents of a small full bottle of "hard liquor" which Roehm had carried into the vehicle. Helbig drove them to an off-post liquor store in downtown Long Beach and purchased a 12-pack of Budweiser beer. To reach the liquor store Helbig drove north on Interstate-710 with a driving distance of approximately 8 miles and a driving time of approximately 15-20 minutes.

At approximately 4:00 p.m., an hour and a half after they left the Engineering Party, Helbig, Bisel and Roehm were in an accident on the Gerald Desmond Bridge. Four empty cans of Budweiser beer were found on the floor of the vehicle. Plaintiffs were in a "liberty status" at the time of the accident and were not scheduled to return to "on-duty" status until 7:00 a.m. the next morning.

In 1992 the United States navy found both plaintiffs to be 100% disabled as a result of the injuries they suffered in the automobile accident, and characterized the injuries as having been incurred "in line of duty." The Veterans Administration ("VA") has classified plaintiffs as 100% disabled and awarded Plaintiffs 100% service-connected disability compensation for the injuries they suffered in the automobile accident.

II.

The Federal Tort Claims Act constitutes a limited waiver of sovereign immunity by the United States. Flechsig v. United States, 991 F.2d 300, 302 (6th Cir. 1993). Subject matter jurisdiction exists under the FTCA only when

> the [claimed injury was] caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be

> liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b).

Whether or not this Court has jurisdiction over Plaintiffs' claim that the government is vicariously liable for Helbig's negligence, then, depends on whether Helbig, at the time of the accident, was acting "within the scope of his employment" as that term is defined by California law. See Flechsig, 991 F.2d at 302-03.

Under California law, the doctrine of respondeat superior is simply stated: an employer is vicariously liable for the torts of its employees committed within the scope of the employment. Lisa M. v. Henry Mayo Newhall Memorial Hospital, 48 Cal.Rptr.2d 510, 512, 907 P.2d 358 (1995). What activities fall "within the scope of employment," however, is not as simply stated.

The California Supreme Court recently outlined "scope of employment" principles as follows:

> An employer is liable for risks "arising out of the employment." A risk arises out of the employment when "in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. In other words, where the question is one of vicarious liability, the inquiry should be whether the risk was one 'that may fairly be regarded as typical of or broadly incidental' to the enterprise undertaken by the employer." Accordingly, the employer's liability extends beyond his actual or possible control of the employee to include risks inherent in or created by the enterprise.

Farmers Ins. Group v. County of Santa Clara, 47 Cal.Rptr.2d 478, 486 (1995) (quoting Perez v. Van Groningen & Sons, Inc., 227 Cal.Rptr. 106, 108-09, 719 P.2d 676 (1986) (citations omitted)).

According to the court in Farmers, the foreseeability test from Rodgers v. Kemper Const. Co., 50 Cal.App.3d 608, 124 Cal.Rptr. 143 (1975) ("employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business"), is useful "because it reflects the central justification for respondeat superior: that losses fairly attributable to an enterprise—those which foreseeably result from the conduct of the enterprise— should be allocated to the enterprise as a cost of doing business.s." Farmers, 47 Cal.Rptr. at 486.

There is no question that California has adopted an expansive reading of the respondeat superior doctrine. However, this Court does not agree with the commentators cited in Taber v. Maine, 67 F.3d 1029, 1034 (2nd Cir. 1995), that California has taken the lead in "equating the scope of respondeat superior liability to the traditionally broader coverage mandated by workers' compensation statutes." To say that California has "equated" respondeat superior liability with workers compensation liability is an overstatement. In Perex v. Van Groningen & Sons, Inc., 227 Cal.Rptr. 106, 719 P.2d 676, 679 (1986), the California Supreme Court underscored the fact that the test under the workers' compensation law of "arising out of and in the course of employment" is not identical with the test for scope of employment under the doctrine of respondeat superior. 227 Cal.Rptr. at 967 n. 2. The Perez court warned that although workers' compensation decisions can be helpful in determining whether an employer should be vicariously liable, they are not controlling precedent when liability is predicated upon respondeat superior principles. Id. See also Anderson v. Pacific Gas and Elec. Co., 17 Cal.Rptr.2d 534, 537 (Ct.App. 1993) (citing instances

where workers compensation and vicarious liability cases produce different results.)

To recover under respondeat superior, Plaintiffs bear the burden of proof to demonstrate that Helbig's tortious act was committed within the scope of his employment. See Perez, 227 Cal.Rptr. at 109; 719 P.2d at 679. Generally, the issue of scope of employment is a question of fact. However, it becomes a question of law when the facts are undisputed and no conflicting inferences are possible. Id.; Le Elder, 26 Cal.Rptr.2d at 752. Neither side has pointed to factual disputes in this case that would prevent this Court from deciding the applicability of respondeat superior as a matter of law.

III.

In order to determine whether Helbig was acting within the scope of his employment at the time of the accident, the Court must consider how California courts have ruled on "scope of employment" issues.

As a starting point, the most obvious cases are ones in which the employee commits a tortious act while performing his or her ordinary duties for the employer at the employer's place of business. Childers v. Shasta Livestock Auction Yard, Inc., 190 Cal.App.3d 792, 801; 235 Cal.Rptr. 641, 644 (1987). This is not one of those cases. The court must look instead at the more difficult cases, i.e., those arising after hours, off-premises, and not in the performance of normal work duties.

As a general rule, an employee is not considered to be acting within the scope of employment when going to or coming from his or her place of work. Anderson, 17 Cal.Rptr.2d at 536. This is known as the "going and coming rule." However, an exception to the "going-and-coming" rule may be found when the employer derives some incidental benefit from the employee's trip. Id. This is known as the "special errand" rule.

If the employee is not simply on his way from his home to his normal place of work or returning from said place to his home for his own purpose, but is coming from his home or returning to it on

a special errand either as part of his regular duties or at a specific order or request of his employer, the employee is considered to be in the scope of his employment from the time that he starts on the errand until he has returned or until he deviates therefrom for personal reasons.

Boynton v. McKales, 294 P.2d 733, 740 (Cal.App. 1956).

In Boynton an intoxicated driver struck the plaintiff while he was driving home from a banquet given by his employer. The court held that an employee's attendance at a company party may come under the "special errand rule" if the function or the employee's attendance was connected with the employment and was intended to benefit the company. Id. at 741. Because the evidence in Boynton was sufficient to enable a jury to find that the party was not strictly social but was rather an official company function intended to benefit the company, the court held that the issue of the employer's liability for the employee's negligence as he drove home from the party was properly before the jury.

Similarly, in Harris v. Trojan Fireworks Co., 174 Cal.Rptr. 452 (Cal.App. 1981), the court held that an employer could be held vicariously liable for an intoxicated employee's negligence as he drove home from an office Christmas party. The Harris court, however, did not apply the special errand exception to the going and coming rule. Instead, the court applied the "foreseeability" test from Rodgers:[2]

> [L]iability attaches where a nexus exists between the employment or the activity which results in an injury that is foreseeable. Foreseeable is here used in the sense that the employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among the other costs of the employer's business.

174 Cal.Rptr. at 456 (footnote omitted) (citing Rodgers, supra). In

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[2] In Rodgers the employer was held vicariously liable for an assault committed after work hours on the job site by its employees who had been drinking, as was customary, at the job site. 124 Cal.Rptr. 143.

affirming the employer's liability the court reasoned that the fact that the employee would "attempt to drive home while still intoxicated and might have an accident was foreseeable as that term is used in Rodgers." Harris, 174 Cal.Rptr. at 457.

In Childers two employees were in an auto accident after drinking alcohol on their employer's premises after work. The court stated in dicta that where an employee consumes alcohol in the scope of his or her employment, the employer is liable for injuries proximately caused to members of the public by the consumption of alcohol. 235 Cal.Rptr. at 642. The court reasoned that respondeat superior liability is properly applied where an employee undertakes activities within his or her scope of employment that cause the employee to become an instrumentality of danger to others "even where the danger may manifest itself at times and locations remote from the ordinary workplace." Id. at 647. Although the court discussed the doctrine of respondeat superior liability at length, the discussion was not essential to its decision because the court ultimately determined that the plaintiffs' exclusive remedy against his employer was in workers' compensation. Id. at 656.

Plaintiffs contend that the rule to be garnered from the cases cited is that when an employer furnishes alcohol at an employer-sponsored party which employees are expected to attend, and an employee becomes intoxicated, the employee is within the scope of his employment if his intoxicated condition results in injury to himself or another, "regardless of when or where the injury is sustained."

Plaintiffs overstate the holdings in these cases. As far as this Court can discern from the opinions in Boynton and Harris, at the time of the accidents the employees were headed directly home from their employers' parties. In Rodgers the employees were still on the employer's premises at the time of their tortious conduct. In Childers the employee was on her way to feed her horses (the opinion does not mention where the horses were stabled.)

This Court is not convinced that the employers would have been held vicariously liable in any of these cases if the employees had taken a detour after leaving the party and had imbibed additional alcohol off the work site prior to the accident.

This Court does not believe a different conclusion is warranted under the recent Second Circuit decision in Taber, 67 F.3d 1029. In Taber the Second Circuit held the Navy vicariously liable for the conduct of an intoxicated serviceman who was involved in an automobile accident off-base. Although Taber was governed by the law of Guam, due to the scarcity of case law on the issue of respondeat superior, the court looked to California law for guidance. The court explained that respondeat superior liability was imposed because of the serviceman's on-base drinking at an on-base beach party, cocktails at the enlisted personnel club, and drinking at a barracks party in the room of a superior officer on the day of the accident. 67 F.3d at 1037 n.4. The court specifically stated that it would not impose respondeat superior liability for an off-base tort resulting from drinking at an off-base bar. Id.

Whether this Court applies the special errand exception to the going and coming rule articulated in Boynton or the foreseeability test articulated in Harris, the question is the same: was the risk involved "typical or broadly incidental" to the enterprise undertaken by the employer. Rodgers, 50 Cal.App.3d at 619. "Where the employee's conduct has substantially deviated from his or her duties, it is unjust to hold the employer liable. Thus, it is necessary to determine the main purpose of injury-producing activity: If it was the pursuit of the employee's personal ends, the employer is not liable." Le Elder v. Rice, 26 Cal.Rptr.2d 749, 751 (Ct.App. 1994).

If the accident had occurred while Helbig was driving home directly after leaving the Engineering party, it appears that under California case law there would at least be a question of fact as to whether or not the party was for the benefit of his employer such that the employer should be held liable under the doctrine of respondeat superior.

Helbig, however, did not go directly home. Rather than driving straight home on Route 47 which would have taken approximately 5 minutes, Helbig and Plaintiffs consumed a bottle of hard liquor in Helbig's car, then drove north 8 miles on I-710 for 15 to 20 minutes into downtown Long Beach, bought a 12-pack of beer, and consumed at least a beer a piece prior to the accident. The accident did

not occur until an hour and a half after he left the party.

Even if Helbig's consumption of alcohol at the Engineering party was within the scope of his employment, by the time of the accident he had departed substantially from his employment. He had embarked on a purely personal mission which included purchasing and drinking additional alcohol. These are not risks inherent in or created by the Navy's enterprise. The Navy could not reasonably have expected or foreseen this diversion. Helbig's actions after leaving the party were not foreseeable and it would not be fair to impose the loss resulting from Helbig's actions on the Navy.

In order to find respondeat superior liability in this case the Court would have to extend the application of the California cases to more remote factual scenarios. In view of the fact that the FTCA is a limited exception to sovereign immunity, the Court declines to extend the reach of the California doctrine of respondeat superior.

Finally, the Court finds that imposing vicarious liability on the government in this case would not further any of the three policy justifications for the doctrine of respondeat superior: (1) to prevent recurrence of tortious conduct; (2) to give greater assurance of compensation for the victim, and (3) to ensure that the victim's losses will be equitably borne by those who benefit from the enterprises that gave rise to the injury. Farmers, 47 Cal.Rptr.2d at 492-93; Perez, 719 P.2d at 678. It would not prevent the recurrence of similar accidents because the Navy could not foresee or control Helbig's conduct after he left the base; Plaintiffs have been fully compensated; and it would not ensure that the plaintiffs' losses would be borne by those who benefitted from the injury producing activity. The costs of any judgment would not be born by the officers and crew of the U.S.S. Racine, but would simply be passed on to the American taxpayers.

Plaintiffs have been and continue to be compensated for their injuries through payment of all medical expenses incurred by the Navy while both were on active duty,[3] payment of many post-dis-

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[3] $658,654.19 for Roehm as of October 9, 1992, and $307,864.80 for Bisel as of October 9, 1992.

charge medical expenses through CHAMPUS, provision of certain medical care by the Department of Veterans Affairs, and receipt of post-discharge military retired pay and tax-free Veterans' Administration 100% service connected disability compensation.[4] Incidentally, under California law, private citizens in Plaintiffs' position would have no cause of action in tort against their employer. Their exclusive remedy would be workers compensation. Childers, 235 Cal.Rptr. at 656.

Plaintiffs have not met their burden of proving that Helbig was acting within the scope of his employment at the time of the accident. Accordingly, the government's motion for summary judgment will be granted and Plaintiffs' complaint will be dismissed.[5]

An order and judgment consistent with this opinion will be entered.

Date: _____

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ROBERT HOLMES BELL
UNITED STATES
DISTRICT JUDGE

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[4] $1,823.00 per month for Bisel and $2,268.00 per month for Roehm.

[5] Because this Court finds that the government is entitled to judgment on the basis of its first argument, the Court will not address the government's arguments under Feres and Shearer.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JEFFREY BISEL and DENNIS ROEHM,

Plaintiffs,

v.

Case No. 2:94-CV-44

HON. ROBERT HOLMES BELL

UNITED STATES OF AMERICA,

Defendant.

_____/

ORDER AND JUDGMENT

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that Defendant United States of America's motion for summary judgment (Docket # 44) is **GRANTED.**

IT IS FURTHER ORDERED that **JUDGMENT** is entered for the United States of America and this action is **DISMISSED** in its entirety.

Date:_____

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ROBERT HOLMES BELL
UNITED STATES
DISTRICT JUDGE